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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

WESTERN STATES CENTER, INC., an
Oregon public benefit corporation; THE FIRST
UNITARIAN CHURCH OF PORTLAND,
OREGON, an Oregon religious nonprofit
corporation; SARA D. EDDIE, an individual;
OREGON STATE REPRESENTATIVE
KARIN A. POWER, an elected official; and
OREGON STATE REPRESENTATIVE
JANELLE S. BYNUM, an elected official,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; UNITED
STATES CUSTOMS AND BORDER
PROTECTION; FEDERAL PROTECTIVE
SERVICE; and UNITED STATES
MARSHALS SERVICE

Defendants.

Case No. 3:20-cv-01175-JR

**THIRD DECLARATION OF
CLIFFORD S. DAVIDSON**

THIRD DECLARATION OF CLIFFORD S. DAVIDSON

I, Clifford S. Davidson, declare as follows:

1. I am an attorney with Snell & Wilmer L.L.P., plaintiffs' counsel of record in this action. I have personal knowledge of the matters stated herein. If called upon to do so, I would testify truthfully as follows. With respect to the exhibits to this declaration that are PDFs of Internet materials, I have reviewed such Internet materials by following the links specified below. The exhibits hereto, which I have printed, or caused to be printed, as PDFs, are substantively identical to the websites referenced below.

2. Attached hereto as Exhibit 1 is a true and correct copy of a PDF of a tweet available as of September 7, 2020 at <https://twitter.com/realDonaldTrump/status/1300421406849671168>. I have excerpted the Tweet from associated comments and advertisements.

3. Attached hereto as Exhibit 2 is a true and correct copy of an August 31, 2020 letter from Acting Secretary Chad F. Wolf to Portland Mayor Ted Wheeler. The letter is available as of September 7, 2020 at https://www.dhs.gov/sites/default/files/publications/20_0831_as1_letter-ted-wheeler-portland.pdf.

4. Attached hereto as Exhibit 3 are true and correct copies of pages from the transcript of the August 4, 2020 Deposition of Officer Gabriel Russell taken by the plaintiffs in *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-01035-SI.

5. Attached hereto as Exhibit 4 is a true and correct copy of a PDF of a tweet available as of September 7, 2020 at <https://twitter.com/realDonaldTrump/status/1300170578134003713>. I have excerpted the Tweet from associated comments and advertisements.

I declare under penalty of perjury that the foregoing is true and correct, and that I executed this declaration on the 8th day of September, 2020 at Portland, Oregon.

/s/ Clifford S. Davidson



Donald J. Trump 
@realDonaldTrump

Portland is a mess, and it has been for many years. If this joke of a mayor doesn't clean it up, we will go in and do it for them!

6:13 AM · Aug 31, 2020 · Twitter for iPhone

34.4K Retweets **3.8K** Quote Tweets **185.8K** Likes



Secretary

U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

August 31, 2020

Mayor Ted Wheeler
1221 SW Fourth Avenue, Suite 340
Portland, Oregon 97204

Dear Mayor Wheeler:

I have received your letter addressed to President Trump dated August 28, 2020. The President asked that I respond on his behalf.

You state in your letter that “[t]here is no place for looting, arson, or vandalism in our city.” Unfortunately, you have failed to back up that sentiment with any action. In fact, your inaction has fostered an environment that has fueled senseless violence and destruction night after night. For more than three months, Portland has become the epicenter of crime and chaos, with rioters attacking government buildings with the intention of burning them to the ground. As of today, since July 31, 2020, there have been 255 arrests made by local law enforcement and 23 riots and unlawful assemblies declared. Despite this, you have stood by passively, arguing that the nightly violence “will ultimately *burn itself out*.” The evidence demonstrates otherwise.

Due to a lack of action throughout the summer, Portland and its law-abiding residents continue to suffer from large-scale looting, arson, and vandalism—even killing. Businesses remain shuttered and Portlanders are held hostage by the daily violence that has gripped the city with no end in sight. This is precisely why President Trump has—and continues to—offer federal law enforcement assistance to Portland. And that is why I, in my capacity as the Acting Secretary of Homeland Security, was not only authorized, but statutorily *obligated*, to protect federal property and persons on that property.

With your letter you included a YouTube video in which your television interviewer attested that “there was more unrest in [Portland] last night. Portland police declared a riot, saying that protestors [*sic*] broke into the Police Association building, the union, and lit it on fire.” That same YouTube video contained chilling footage of the arson that was terrorizing your city; and it was perpetrated by rioters, not by peaceful protesters. The chaos, destruction, and suffering in Portland are evils you can stop—and must stop. Consider what happened recently in Wisconsin—where the State of Wisconsin requested and received federal law enforcement assistance and the violence and looting there ended.

I hope you honor your commitment that “[t]hose who commit criminal acts will be apprehended and prosecuted under the law.” To that end, I encourage you to work with and disabuse the District Attorney of Multnomah County of his refusal to prosecute individuals who have committed such crimes as: interference with a law enforcement officer, rioting, criminal trespass, second-degree disorderly conduct, escape, or a city ordinance violation. In short, ignoring criminal

Mayor Ted Wheeler
Page 2

behavior is no way to protect the citizens of your community, the same citizens who entrusted you to hold elected office. We hope and expect that fairness and good judgment will prevail in Portland.

Accordingly, I urge you to prioritize public safety and to request federal assistance to restore law and order in Portland. We are standing by to support Portland. At the same time, President Trump has made it abundantly clear that there will come a point when state and local officials fail to protect its citizens from violence, the federal government will have no choice but to protect our American citizens.

DHS remains wholly committed to ensuring the rights of peaceful protesters and conducts all activities in full compliance with the Constitution and federal law. I am proud of our brave and selfless officers and of our federal, state, and local partners.

Sincerely,

A handwritten signature in black ink, appearing to read "Chad F. Wolf", written in a cursive style.

Chad F. Wolf
Acting Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

INDEX NEWSPAPERS LLC,

et al.,

Plaintiffs,

v.

No. 3:20-cv-01035-SI

CITY OF PORTLAND, et al.,

Defendants.

VIDEO DEPOSITION OF GABRIEL RUSSELL

Taken in behalf of Plaintiffs

Tuesday, August 4, 2020

Reported by: Marilyn Hoover, RPR

Oregon CSR No. 04-0387

1 TUESDAY, AUGUST 4, 2020; AUBURN, WASHINGTON

2 THE VIDEOGRAPHER: We are now on the
3 record. Here begins the Zoom videotaped deposition
4 of Gabriel Russell in the matter of Index Newspapers
5 LLC versus City of Portland, in the U.S. District
6 Court, District of Oregon, Portland Division, case
7 number 3:20-cv-01035-SI.

8 Today is August 4th, 2020. The time is
9 11:13. This deposition is being taken over Zoom at
10 the request of BraunHagey & Borden LLP. The
11 videographer is Emily Walter of Magna Legal
12 Services, and the court reporter is Marilynn Hoover
13 of Magna Legal Services. All counsel will be noted
14 on the stenographic record.

15 Will the court reporter please swear in
16 the witness.

17 THE REPORTER: The attorneys participating
18 in this deposition acknowledge that I am not
19 physically present in the deposition room and that I
20 will be swearing in the witness and reporting this
21 deposition remotely. The parties and their counsel
22 consent to this arrangement and waive any objections
23 to this manner of reporting.

24 Please indicate your agreement by stating
25 your name and agreement on the record.

1 MR. ACHARYA: This is Athul Acharya for
2 plaintiffs, and I agree.

3 MR. GARDNER: This is Josh Gardner on
4 behalf of the defendants, and I agree as well.

5 THE REPORTER: Michelle, please.

6 MS. TONELLI: Michelle Tonelli for
7 defendants. I agree as well.

8 GABRIEL RUSSELL,
9 called as a witness, being duly sworn on oath, was
10 examined and did testify as follows:

11 MR. GARDNER: Ms. Hoover, before we begin:
12 The defendants reserve the right to have the witness
13 read and sign.

14 THE REPORTER: So noted.

15 MR. GARDNER: Thank you.

16 THE REPORTER: You may begin, counsel.

17 EXAMINATION

18 BY MR. ACHARYA:

19 Q. Good morning, Officer Russell. How are
20 you today?

21 A. Good. How are you?

22 Q. Doing well. Is it morning where you are?

23 A. It is 11:16 a.m., so it's still morning
24 here.

25 Q. You're -- You're in Portland?

1 question.

2 You said you have situations -- seen
3 situations where...

4 A. Where deploying additional forces resulted
5 in enhanced protection, which was the goal of the
6 operation.

7 Q. I see. Is Diligent Valor over?

8 A. It is not.

9 Q. So the extra CBP forces are still here?

10 MR. GARDNER: Objection. To the extent
11 that you can answer counsel's question without
12 divulging information that is subject to the law
13 enforcement privilege, you may do so. To the extent
14 you cannot answer his question without divulging
15 such information, I instruct you not to answer.

16 THE WITNESS: I'm not going to answer that
17 question.

18 Q. BY MR. ACHARYA: Are the extra ICE forces
19 still here?

20 MR. GARDNER: Same objection and same
21 instruction.

22 THE WITNESS: Same answer.

23 Q. BY MR. ACHARYA: When will the extra
24 forces leave?

25 MR. GARDNER: Same objection, same

1 instruction.

2 THE WITNESS: Same answer.

3 Q. BY MR. ACHARYA: All right. Let's talk
4 about the command structure of your position.

5 Who directly reports to you?

6 A. The -- I'm the incident commander, the
7 deputy incident commander, and the staff sections
8 directly report to me.

9 Q. Deputy incident commander, and what was
10 the other thing?

11 A. Staff sections.

12 Q. And there are several staff section
13 commanders?

14 A. Yes, or supervisors --

15 (Reporter request.)

16 THE WITNESS: Supervisors, people in
17 charge of staff section, not typically referred to
18 as commanders.

19 Q. BY MR. ACHARYA: And what does the deputy
20 incident commander do?

21 A. Supervises the tactical commanders.

22 Q. Okay. And the tactical commanders are
23 different from the staff section commanders?

24 A. I believe I already answered that staff
25 section supervisors are not referred to as

1 I'm going to put another Donald Trump
2 tweet into the chat. This is going to be Exhibit 3.

3 (Exhibit 3 marked.)

4 Q. BY MR. ACHARYA: And while -- while you've
5 done all that, I'll read it into the record.

6 It says: "Homeland Security is not
7 leaving Portland until local police complete cleanup
8 of anarchists and agitators."

9 Is it accurate to say that DHS's enhanced
10 presence is not leaving Portland until local police
11 complete cleanup of anarchists and agitators?

12 A. Give me a second to -- That's -- That's a
13 hypothetical and I don't...

14 Q. That's not a hypothetical. That's a
15 question about what -- what Homeland Security is
16 going to do.

17 Are they -- Is DHS's enhanced presence
18 leaving Portland -- is not leaving Portland until
19 local police complete cleanup of anarchists and
20 agitators? Is that true?

21 A. I don't know the answer to that.

22 Q. So you don't know when Homeland Security's
23 enhanced presence will leave?

24 A. That's correct.

25 MS. TONELLI: Objection; law enforcement

1 privilege. We're -- We're going into -- it's the
2 same idea of when our officers may withdraw.

3 MR. ACHARYA: Yeah, I think this tweet
4 waives that privilege.

5 MS. TONELLI: No, because you're asking
6 for more detail.

7 MR. GARDNER: Yeah, it does not waive any
8 privilege about the details of due law enforcement
9 efforts in Portland.

10 MR. ACHARYA: That's a -- No, that's the
11 sword and shield situation. If the --

12 MR. GARDNER: It's not a sword and shield
13 at all, sir. We'll have to agree to disagree.

14 Q. BY MR. ACHARYA: Let's talk about
15 coordination of forces.

16 How do you coordinate field operations
17 with the Marshals Service?

18 A. There's a tactical command post at the --
19 at the federal courthouse, where the tactical
20 commanders of DHS and the tactical commanders of the
21 Marshals Service coordinate activities.

22 Q. Do you -- Are you ever in that tactical
23 command post?

24 A. I have been, yes, several times.

25 Q. Are you -- Are you usually in that command

1 (Reporter request.)

2 MR. GARDNER: Yes. Again, to the extent
3 the witness can answer that question without
4 divulging information that is subject to law
5 enforcement privilege, he may do so; otherwise, I
6 instruct the witness not to answer.

7 THE WITNESS: I will not answer that.

8 Q. BY MR. ACHARYA: Does the Federal
9 Protective Service have the power to declare an
10 unlawful assembly?

11 A. Yes.

12 Q. Where does that authority come from?

13 A. Our law enforcement powers, jurisdiction
14 and authority.

15 Q. Does the Federal Protective Service have
16 the power to enforce such an order on Southwest
17 Fourth Street in Portland?

18 A. That depends.

19 Q. What would that depend on?

20 (Reporter request.)

21 Q. BY MR. ACHARYA: Under what circumstances
22 would FPS have power to enforce an unlawful assembly
23 order on Fourth Street?

24 A. The FPS jurisdiction and authority allows
25 FPS law enforcement officers to take enforcement

1 action on and around federal property for the
2 protection of federal property and people on it.

3 So if there was, for example, someone who
4 was off a federal property and they were committing
5 assaults against federal officers, using projectiles
6 or something of that nature, federal officers could
7 take enforcement action.

8 Q. Understood. But I'm asking about
9 dispersal orders, which are dispersal orders to
10 unlawful assembly; so we're not talking about any
11 actions against federal officers.

12 Does FPS have authority to enforce a
13 dispersal order against an unlawful assembly on
14 Southwest Fourth Street?

15 A. On Southwest Fourth Street?

16 Q. That's one street west of the federal
17 courthouse.

18 A. Generally, no.

19 Q. So you've policed protests, many protests?

20 A. Yes.

21 Q. Have you personally policed them on the
22 ground?

23 A. Yes.

24 Q. Can you tell me when and where?

25 A. I -- The Federal Protective Service in

1 know, if a protest becomes violent, they have the
2 ability to move protesters -- you know, I don't want
3 to say anywhere they want, but a lot of different
4 areas in the city, while the federal authorities
5 are, you know, required to operate within a
6 reasonable distance of a federal facility. So that
7 just -- So it necessitates different tactics.

8 Q. Sure. Understood.

9 So you're a supervisor. Are you
10 responsible for making sure that the people that you
11 tactically command don't use excessive force?

12 A. Yes.

13 Q. Okay. Do you see what -- what federal
14 agents did to the guy wearing the navy shirt,
15 Christopher David?

16 A. Yes.

17 Q. Did you think that was excessive force?

18 THE WITNESS: Counsel, should I answer
19 this?

20 MR. GARDNER: I mean, if you can do so
21 without disclosing information that is subject to
22 the law enforcement privilege or other privileges,
23 you may. If you need to consult, we can also do
24 that.

25 THE WITNESS: Can we consult briefly?

1 asked for the instruction -- which I'd like to
2 remind you once again that you're under oath and
3 that you can't assert the privilege unless the
4 privilege exists, and that your very competent
5 counsel will remind you if there's a possibility of
6 a privileged answer.

7 MR. GARDNER: And I will remind counsel
8 that, as a law enforcement officer, he is well
9 positioned to know what sort of information
10 implicates the law enforcement privilege. To the
11 extent he believes the information you are asking
12 for does implicate that privilege, he has every
13 right and responsibility not to disclose that
14 information.

15 MR. ACHARYA: Of course. Just --

16 MR. GARDNER: You seem to be suggesting to
17 him otherwise.

18 MR. ACHARYA: Let's go back to questions.

19 Q. BY MR. ACHARYA: So we were talking about
20 Christopher David, and you saw the video of the
21 federal agents beating him with their batons.

22 Did you think that was excessive force?

23 MR. GARDNER: Objection; calls for a legal
24 conclusion.

25 THE WITNESS: I -- I observed some video

1 of the incident that I believe you're referring to,
2 and a thorough investigation might reveal
3 information that I don't know of, or other video,
4 but the -- but the video that I saw, it did appear
5 to me to be excessive force.

6 Q. BY MR. ACHARYA: Okay. Did you train
7 those officers to do that?

8 A. The officers involved in that did not --
9 did not work for me, did not answer to me.

10 Q. Who do they work for?

11 A. They don't belong -- I don't believe that
12 they belong to the Department of Homeland Security
13 and were not operating under my tactical control or
14 supervision.

15 Q. Were they part of the United States
16 Marshals Service?

17 A. I've -- I've been told that. I don't -- I
18 don't know that for sure, but I've -- I've been told
19 that.

20 Q. Thank you. So, as a supervisor, you're
21 responsible for making sure that people you're
22 supervising conduct themselves according to the
23 rules; is that correct?

24 A. Yes.

25 Q. Have you read the declarations that we

1 any matches, but that's just for FPS.

2 I think I explained earlier: I have
3 tactical control of the DHS forces; I do not have
4 administrative control. Each component has their
5 own use of -- use of force reporting chain of
6 command.

7 Q. Are you responsible for the -- Are you
8 responsible for the conduct -- Are you responsible
9 for making sure that the agents assigned to Diligent
10 Valor in Portland conduct themselves according to
11 the rules?

12 A. Their immediate supervisors are generally
13 responsible for ensuring that any law enforcement
14 officer who witnesses misconduct by another law
15 enforcement officer is responsible -- a federal
16 officer, is responsible to try and stop the behavior
17 and to report the misconduct.

18 Q. Do you keep logs of which agents are
19 assigned to which duties?

20 A. For our agency, generally, yes.

21 Q. Do you keep logs for Diligent Valor?

22 A. Generally, yes.

23 Q. Okay. Do you track agents' locations?

24 MR. GARDNER: Answer that question with a
25 yes or a no -- that does not call for privileged

1 information -- and then we can wait for the next
2 question.

3 THE WITNESS: It's not -- not -- We don't
4 track their specific location except that as they
5 report it. So they -- you know, they're going to
6 have an assignment, so to speak, but they move
7 around over the course of, you know, an operational
8 period. And --

9 Q. BY MR. ACHARYA: Do you keep recordings --

10 A. Go ahead.

11 Q. Sorry. Finish your -- Finish your answer.

12 A. So their -- their movements of, you know,
13 officers and agents that might be reflected in, you
14 know, the log as they call things out on the radio
15 or something.

16 Q. Okay. Do you keep recordings of radio
17 transmissions?

18 MR. GARDNER: Again, you can answer that
19 question with a yes or no.

20 THE WITNESS: The FPS radio system, there
21 are recordings that are kept. I can't speak for
22 other components.

23 Q. BY MR. ACHARYA: And do you track agents'
24 use of munitions?

25 MR. GARDNER: I'm sorry. Can you repeat

1 Q. In this operation, you have not used tear
2 gas.

3 So do you do anything to help you identify
4 what FPS agents are at a given location at a given
5 date and time?

6 MR. GARDNER: Objection; vague. Also, I'm
7 not sure I understand the question; but to the
8 extent it's calling for information that would be
9 subject to the law enforcement privilege, I would
10 instruct you not to answer.

11 Maybe you could rephrase it.

12 MR. ACHARYA: Sure.

13 Q. BY MR. ACHARYA: The question is: You
14 know, we have about 30 declarations now of uses of
15 force that are unlawful and in violation of the
16 First Amendment. I think you've said you've read at
17 least the ones submitted in support of the TRO.

18 So my question is: A lot of those talked
19 about a place, a time, a location. Do you have
20 information sufficient to know which agents were
21 present at that place, time, and location?

22 MR. GARDNER: I see. I understand the
23 question now.

24 Objection. Mischaracterizes the documents
25 you're referring to. No further objections.

1 Q. BY MR. ACHARYA: Please answer.

2 A. I believe I already answered that, that I
3 believe it's seven incidents that reported to, and
4 we compared those with our -- with our FPS use of
5 force reports, and we did not find a direct
6 correlation between the complaints and FPS use of
7 force. There may be other agencies involved in the
8 operation, that that used a similar type of analysis
9 and discovered a match.

10 Q. So CBP and ICE uses of force, do you have
11 any ability to look at those?

12 A. No. They have their own computer systems.

13 MR. ACHARYA: So I'm going to put a
14 declaration into the record here. This is the
15 declaration of Mathieu Lewis-Rolland, signed on July
16 22nd, 2020, docket number 77.

17 Tell me when you have it open.

18 THE REPORTER: Marked next in order,
19 counsel?

20 MR. ACHARYA: Sorry. Yeah, next in order.
21 So what was that, Exhibit 5?

22 THE REPORTER: Correct.

23 (Exhibit 5 marked.)

24 THE WITNESS: So where -- I have it. What
25 paragraph are you looking at?

1 REPORTER CERTIFICATE

2
3 I, MARILYNN HOOVER, CSR No. 04-0387 for the
4 State of Oregon, do hereby certify:

5 That prior to being examined, the witness named
6 in the foregoing deposition was duly sworn to
7 testify the truth, the whole truth, and nothing but
8 the truth;

9 That said deposition was taken down by me in
10 shorthand at the time and place therein named, and
11 thereafter reduced by me to typewritten form; and
12 that the same is a true, correct, and complete
13 transcript of the said proceedings.

14 Before completion of the deposition, review of
15 the transcript [X] was [] was not requested. If
16 requested, any changes made by the deponent (and
17 provided to the reporter) during the period allowed
18 shall be appended hereto.

19 I further certify that I am not interested in
20 the outcome of the action.

21 Witness my hand this 6th day of August 2020.

22
23 _____
24 MARILYNN HOOVER, RPR

25 CSR No. 04-0387; Exp. 03/31/2023

**Donald J. Trump**  @realDonaldTrump · Aug 30

Ted Wheeler, the wacky Radical Left Do Nothing Democrat Mayor of Portland, who has watched great death and destruction of his City during his tenure, thinks this lawless situation should go on forever. Wrong! Portland will never recover with a fool for a Mayor....

 15.4K 34.9K 126.5K**Donald J. Trump**  @realDonaldTrump

....He tried mixing with the Agitators and Anarchists and they mocked him. He would like to blame me and the Federal Government for going in, but he hasn't seen anything yet. We have only been there with a small group to defend our U.S. Courthouse, because he couldn't do it....

1:36 PM · Aug 30, 2020 · Twitter for iPhone

16.5K Retweets **414** Quote Tweets **71.5K** Likes**Donald J. Trump**  @realDonaldTrump · Aug 30Replying to [@realDonaldTrump](#)

..The people of Portland, like all other cities & parts of our great Country, want Law & Order. The Radical Left Democrat Mayors, like the dummy running Portland, or the guy right now in his basement unwilling to lead or even speak out against crime, will never be able to do it!

 8.6K 20.2K 78.2K